No. 17-21

IN THE

Supreme Court of the United States

FANE LOZMAN,
Petitioner,

v.

THE CITY OF RIVIERA BEACH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE DISTRICT OF COLUMBIA AND THE STATES OF IDAHO, INDIANA, LOUISIANA, MISSISSIPPI, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, UTAH, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court held that probable cause defeats a First Amendment retaliatory-prosecution claim as a matter of law. Does probable cause likewise defeat a First Amendment retaliatory-arrest claim?

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INTEREST OF *AMICI CURIAE*

The ability to enact, administer, and enforce criminal laws is at the heart of a State's sovereignty. Most crimes fall under state, rather than federal, jurisdiction, making law enforcement a primary function for state and local governments. In protecting the safety of their residents, States have a vital interest in ensuring that law enforcement officers can arrest based on probable cause. Where a State has authorized arrest for a crime, and that arrest is based on probable cause, arresting officers should not have to fear that they will be subject to liability for a First Amendment retaliatory-arrest claim. State law enforcement would be impaired if officers are deterred from making arrests by the prospect that they will have to defend their subjective motivations years later in a subsequent civil lawsuit.

The *Amici* States urge this Court to uphold the court of appeals' decision and, consistent with its decision in *Hartman v. Moore*, 547 U.S. 250 (2006), determine that the absence of probable cause is an element of a First Amendment retaliatory-arrest claim.

SUMMARY OF ARGUMENT

As respondent explains, it follows from this Court's precedent and common-law analogues that 42 U.S.C. § 1983 requires a plaintiff to show a lack of probable cause to recover damages for an arrest allegedly in violation of the First Amendment. The *Amici* States write to highlight two additional points.

1. Petitioner's proposed rule will create immense practical difficulties for law enforcement. Under this rule, virtually every arrest would give rise to a potentially viable retaliatory-arrest lawsuit for damages. It would be easy for any arrestee to claim that he engaged in protected speech contemporaneous with his arrest and thus that the arrest was in retaliation for the speech. Routinely, suspects speak to police during encounters, make other reported or overheard statements, and display speech on their clothing, possessions, or vehicles. Unless the speech itself constitutes a crime, virtually all of it would be protected under established law.

It would similarly be easy for an arrestee to allege that the arrest was motivated, in part, by the officer's disagreement with this speech. Much of the speech might be critical and outspoken. Suspects will naturally object to police inquiry, protest their innocence, or communicate their displeasure in other ways. This can turn quite hostile, and police are required to withstand a high degree of insults and verbal abuse in doing their jobs. Persons may also choose to break a law either as a chosen means of protest on some topic or to state their objections to the law itself. Additionally, a suspect's speech may be inculpatory, by suggesting the requisite state of mind, a motive, or other facts relevant to guilt. In all these situations, an arrestee could readily claim that the speech was a motivating factor in his arrest.

Because retaliation would be so easy to claim, petitioner's rule would discourage officers from enforcing the law. Without the protection of an objective, probable-cause test, arresting officers would fear a suit that likely could not be decided without burdensome discovery and a trial. They would also correctly

foresee a real threat of liability inherent in a jury trying to reconstruct their subjective motivations. Because police often must make arrest decisions under difficult and tense circumstances, the threat of such litigation would cause them to hesitate to arrest, even when supported by probable cause and the need to protect the public. Petitioner's rule would also make police encounters more dangerous by encouraging hostility toward officers as a way to avoid arrest.

Petitioner's rule makes an officer's job even more difficult by focusing liability on whether the officer, in his defense, can show that police generally arrest for the crime. An officer cannot realistically know, on the scene, whether he is vulnerable to liability because the offense is one that is not commonly enforced. Petitioner identifies no practical method for making this determination, even for purposes of the officer's defense at trial. His rule is simply unworkable.

Moreover, petitioner's test impairs the ability of police to address localized community problems. Factoring liability on whether police generally arrest for an offense would gradually pressure police, as suits are litigated, to categorize each offense as either one for which they always arrest or never arrest. Among other problems, this frustrates the application of community policing, under which police act with greater discretion, continually using input from the community on what problems warrant police resources and what responses are effective.

2. Petitioner's rule is unnecessary to protect First Amendment interests. States and localities can take effective remedial action in response to citizen complaints of police misbehavior, including alleged retaliation. Law enforcement agencies have an important duty, as well as direct interest, in ensuring that citizen

complaints against officers are thoroughly investigated and appropriate disciplinary action is taken. Such internal review is a vital component of managing a police department and maintaining the public trust upon which law enforcement depends. State and local governments can flexibly adopt solutions that promote law enforcement accountability and effectiveness.

Many forms of external review of citizen complaints have also been implemented throughout the nation. In many cities, citizen review boards with subpoena powers directly investigate complaints and make findings and recommendations. Other jurisdictions have independent oversight agencies that closely review a police department's handling of its own internal affairs investigations. Though the mechanisms may vary, each locality can select the administrative process that best addresses its own situation. State governments have their own oversight role, too, and can enact legislation and policies to ensure that citizen complaints are appropriately handled.

States may also afford additional protections against retaliatory arrest by limiting the arrest power and establishing alternatives to arrest. States generally prohibit warrantless arrests for misdemeanors unless the crime is committed in the officer's presence. States have also circumscribed the power to arrest by providing for release on citation or summons, in lieu of a full custodial arrest, for certain crimes or under certain circumstances. The policies of local governments and police departments may establish additional standards and guidelines for citation in lieu of arrest, thus limiting the potential of retaliatory arrests for such crimes. First Amendment interests are important, but petitioner's highly flawed and impractical rule is not the only option for protecting them.

ARGUMENT

I. Petitioner's Rule Would Inhibit Effective Policing By Discouraging Necessary Arrests, Heightening The Peril Of Arrest Situations, And Limiting The Ability Of Police To Respond To Community Problems.

As the court below correctly recognized, the existence of probable cause defeats a claim for retaliatory arrest. Pet. App. 7a-8a. That conclusion makes sense as a legal matter, *see* Resp. Br. 10-41, but it also furthers important public safety goals. If officers find probable cause to arrest under the totality of the circumstances, they should be entitled to make that arrest—and thereby protect public safety—without fear that they will later be subject to a suit challenging their subjective motivations. Petitioner's contrary rule, while proposed here in a suit against a municipality, would apply equally to the far more typical case brought against the arresting officers. The threat of such suits would not only make officers' already difficult and dangerous jobs even more so, but also hinder law enforcement agencies from taking custody of offenders and implementing effective community policing.

A. Under petitioner's rule, nearly all arrestees could bring suit—and likely force a trial—by questioning the officers' subjective motivations.

1. Retaliatory arrest could be easily claimed in most instances given the prevalence of suspects' protected speech.

Under petitioner's rule, an arrestee may subject his arresting officers to a burdensome lawsuit simply by alleging a retaliatory motive. Such claims will be easy

to advance because an arrestee will almost always be able to identify protected speech contemporaneous with his arrest. There is a "vast realm" of protected speech; content-based restrictions are limited to just a few traditional categories (such as fraud, fighting words, and true threats). *United States v. Alvarez*, 567 U.S. 709, 717-18 (2012) (plurality op.). As a result, in virtually every case an arrestee will have contemporaneously engaged in protected speech.

Suspects rarely remain completely silent during an entire police encounter. Those who have broken the law are not happy with police attention and often speak critically of police. Hoping to frustrate the police investigation and ultimately avoid arrest, they routinely protest their innocence to officers or criticize the propriety of police action. They may also engage in speech that is highly offensive but nevertheless also protected, such as by hurling insults and profanities at police officers. Indeed, this Court has suggested additional First Amendment protection for such speech, in part *because* police officers are trained not to respond to such abuse. *Houston v. Hill*, 482 U.S. 451, 461-62 (1987). Most courts agree and hold police to a higher standard. *State v. Baccala*, 163 A.3d 1, 9 (Conn. 2017) (citing cases).

Perversely, under petitioner's view, a suspect's insults and profanities may well suggest—especially to lay jurors—that officers responded in a retaliatory manner. After all, such words are designed to provoke, and if spoken to an average citizen, would ordinarily prompt an angry and perhaps violent response. Even a suspect's more tempered criticism or disapproval of the officers could still easily be alleged to have motivated an arrest.

An arrestee could also readily allege retaliatory motive when his lawbreaking is directly tied to speech or protest. Persons may break a law to express disagreement with the law itself or related governmental policy. *See Wayte v. United States*, 470 U.S. 598, 600-01 & n.2 (1985) (letters explaining refusal to register with Selective Service). Or they may violate the law simply to express themselves in a manner of their own choosing. For example, protestors may encamp unlawfully on public space, using such continued occupation to expound their message. *See Dukore v. District of Columbia*, 799 F.3d 1137, 1138-39 (D.C. Cir. 2015). Protestors may also trespass on private property of entities whose practices or views they oppose. *See Logsdon v. Hains*, 492 F.3d 334, 337-38 (6th Cir. 2007) (abortion protestors); *Joyce v. Crowder*, 480 F. App'x 954, 955 (11th Cir. 2012) (environmental activists). Because of the close connection between the offense and the expressions of protest in these circumstances, an arrestee could well claim a promising case of retaliation. *See, e.g.*, *Dukore*, 799 F.3d at 1139.

Even speech that provides evidence of criminal activity is protected. A suspect's own speech might place him at the scene of the crime, reveal a motive, or indicate that he acted with the requisite intent or knowledge. But, in petitioner's view, an officer who relies on such inculpatory statements would then become automatically subject to a retaliatory arrest claim. Pet. Br. 33-34. After all, the content of the arrestee's speech would admittedly be a motivating factor in such an arrest. As petitioner has explained, to avoid liability in this circumstance, the officer would have to show that police "generally make arrests for that crime." Reply to Br. in Opp. 10; *accord* Pet. Br. 35 & n.10. It is not clear, however, how an arresting officer could possibly prove this, and even if he could,

there is no reason why an officer who arrests a suspect based on the suspect's own inculpatory statements should be forced to litigate in this circumstance.

The risk of a subsequent suit for retaliatory arrest exists even in the rare case where the suspect says nothing to the officer directly. Officers often overhear, or receive reports of, statements made by the suspect. And even where the suspect himself is entirely silent, he could later claim that something as simple as the bumper sticker on his car or a slogan on his t-shirt was protected speech giving rise to the arrest.

Unable to propose a principle to limit the flood of potential litigation stemming from suspects' speech, petitioner vaguely suggests that sometimes "otherwise protected speech will lose its protection." Pet. Br. 33. By this, petitioner apparently just means that the government may, to some extent, regulate speech in a content-neutral manner. This, however, fails to mitigate the ease with which damages claims would be permitted for allegedly retaliatory arrests that are nevertheless based on probable cause. To use petitioner's own example, a person who criminally violates a reasonable time restriction on speech—disrupting a city council meeting by refusing to stop speaking beyond his allotted time—*would have* a valid retaliatory arrest claim under petitioner's view. *See* Pet. Br. 33. All that the person would have to do is allege that the content of his speech motivated his arrest and dispute that police ordinarily arrest for such violations.

Petitioner also suggests that "speech that confesses to a crime" might not be protected, but fails to explain why under his test. Pet. Br. 33. To use another of petitioner's examples, if a person is arrested after stating that he has burned his draft card because of

his beliefs, then he could still claim that his arrest was retaliatory. *See* Pet. Br. 33-34 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). His claim would be that he would not have been arrested if he had simply omitted mention of his beliefs. Even in the case of a confession, it would be easy to allege that protected speech motivated an arrest.

2. *Petitioner's rule would effectively transform the standard for arresting officers' liability, including qualified immunity, from an objective test into a subjective one.*

Because a showing of protected speech poses little obstacle, petitioner's test for retaliatory-arrest claims would depend on the subjective motivations of the arresting officers. It would thereby supplant the objective standards that this Court, through decades of precedent, has firmly established for assessing the constitutionality of an arrest. "[T]his Court has long taken the view that 'evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'" *Kentucky v. King*, 563 U.S. 452, 464 (2011) (quoting *Horton v. California*, 496 U.S. 128, 138 (1990)).

Qualified immunity would provide arresting officers little protection if it too turned on their subjective motivations. It is designed "to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). As this Court has established, an objective standard for assessing the officers' actions is needed for this purpose. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982). This is because "[j]udicial inquiry into subjective motivation . . . may entail broad-rang-

ing discovery and the deposing of numerous persons, including an official's professional colleagues." *Id.* at 817. After extensive discovery, arresting officers would then likely have to undergo a trial, since "questions of subjective intent so rarely can be decided by summary judgment." *Id.* at 816. As the *Harlow* Court concluded, basing qualified immunity on an officer's subjective motivations "has proved incompatible with [this Court's] admonition . . . that insubstantial claims should not proceed to trial." *Id.* at 815-16.

Petitioner argues implicitly that an officer with retaliatory motive would not be entitled to qualified immunity even if the arrest were objectively reasonable, *i.e.*, supported by probable cause. Pet. Br. 37-38. To be sure, if it were unclear whether the speech was protected, petitioner might concede that qualified immunity would apply. Otherwise though, in petitioner's view, the retaliatory motive establishing a First Amendment violation would necessarily defeat qualified immunity, and thus qualified immunity would provide officers no added protection.

If needed, this Court could (and should) hold that, to the contrary, the existence of probable cause, or arguable probable cause, entitles an officer to qualified immunity on a First Amendment retaliatory-arrest claim. *See Crawford-El v. Britton*, 523 U.S. 574, 612 (1998) (Scalia, J., dissenting). Such a holding would preserve that doctrine's protections for official acts that are objectively reasonable, whatever the subjective intent. But, especially without such an extension of qualified immunity, petitioner's proposed rule would institute a profound and unwarranted shift in assessing officers' liability for arrests. It would replace well-established objective standards with an

open-ended inquiry into an officer's subjective motivations.

B. Petitioner's subjective test would discourage officers from enforcing the law and heighten the danger of arrest situations.

The resulting litigation over officers' subjective motivations for arrests would impose significant societal costs. These would be beyond just the "general costs of subjecting government officials to the risks of trial," such as the "distraction of officials from their governmental duties." *Harlow*, 457 U.S. at 816. First, petitioner's proposal would have a particularly adverse effect on the ability of the States to protect their citizens from crime. "States have a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity, even where there has been no opportunity for a prior judicial determination of probable cause." *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991). Among its other purposes, a custodial arrest "ensures that a suspect appears to answer charges and does not continue a crime." *Virginia v. Moore*, 553 U.S. 164, 173 (2008).

The threat of damages claims based on an officer's subjective motivations would dissuade officers from making legitimate arrests. Officers who acted without retaliatory animus would still have reason to fear not only the burdens of litigation, but also the potential liability that could result. They would be aware that a retaliatory motive is "easy to allege and hard to disprove." *Crawford-El*, 523 U.S. at 584-85. They also often must act "on the spur (and in the heat) of the moment." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). Yet an officer would undoubtedly hesitate to act decisively knowing that a court or jury—far

removed from that moment—would later dissect the constitutionality of his actions based on its own reconstructed view of his thought processes. Officers would thus be incentivized to forgo arrest even when such action is appropriate to secure the public safety. *See Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 337-38 (2012) (explaining rejection of proposed rule for warrantless arrests because "the risk of violating the Constitution would have discouraged [officers] from arresting criminals in any questionable circumstances").

Additionally, police encounters with suspects would become more perilous. Criminals would learn that confrontational speech could be particularly effective in forestalling arrest, because of its added value for a potential lawsuit and the deterrent effect that would have on all but the most resolute officers. Indeed, from the lawbreaker's perspective, the more confrontational and incendiary the speech, the better. Officers meanwhile might reasonably perceive that the suspect's hostility could turn violent. Potential arrest situations are already tense, uncertain, and subject to sudden escalation. Adding a further element of provocation into such a fraught situation would increase the risk of harm to all involved.

C. Petitioner's reliance on whether a law is commonly enforced would further complicate officers' jobs and prove unworkable in practice.

Petitioner's emphasis on whether police generally arrest for the relevant offense only compounds the problem. *See* Pet. Br. 35-36. To protect themselves from suit under petitioner's test, officers would need to know whether the offense for which they have probable cause is "commonly enforced." Pet. Br. 35 n.10.

The answer would be important, in petitioner's view, to both aspects of causation—whether retaliatory motive was a substantial factor in the arrest and, if so, whether the arresting officers had shown that they would have made the arrest anyway. Pet. Br. 35-36. But this would place arresting officers in an impossible spot. Whether a law is generally enforced is not a test that an officer can apply on the scene, especially in the brief time available to decide whether to arrest. *See Florence*, 566 U.S. at 338 ("Officers who interact with those suspected of violating the law have an essential interest in readily administrable rules." (internal quotation marks omitted)).

Petitioner tries to assure that a retaliatory-arrest claim "will likely fail" where a "serious crime" has been committed, since he assumes that police arrest for such crimes virtually every time they can. Pet. Br. 35-36. But this does little, if anything, to ease an officer's predicament. Petitioner does not define what constitutes a "serious" crime and offers only a couple of isolated examples, such as armed robbery. Pet. Br. 36. But only an estimated 5% of arrests are for violent felonies (murder and nonnegligent manslaughter, rape, robbery, and aggravated assault). Federal Bureau of Investigation, *Crime in the United States 2016*, https://tinyurl.com/yatbcyox. Most arrests are presumably for misdemeanors. *See id.*; Cal. Dep't of Justice, *Arrests Reported from 2007-2016*, https://openjustice.doj.ca.gov/2016/arrests (reporting twice as many misdemeanor arrests as felony arrests in California). As the vagueness of petitioner's attempted assurances shows, whether the relevant criminal law is "commonly enforced" will not be apparent for the vast majority of arrests.

Not only would petitioner's rule be impossible for an officer to apply in the field, it would be very difficult

for him to meet in his own defense at trial. Petitioner fails to identify a workable, meaningful measure of how commonly a law is enforced, or indeed any measure at all. Notwithstanding a fleeting reference to "[p]ublicly available statistical information," Pet. Br. 35 n.10, petitioner also fails to show that the requisite statistics for any such measure are even generally available. Beyond these insurmountable obstacles, a stream of other complications would arise in trying to measure whether police generally arrest for an offense. Is the relevant geographic pool nationwide, or by state, police department, or police district? How narrowly or broadly should the relevant offense be categorized? How is the measure affected when multiple or overlapping offenses are involved? And so on.

D. Petitioner's rule would impair the ability of police departments to respond to community problems and concerns.

By looking to whether a law is generally enforced to determine liability, petitioner's rule would inhibit the flexibility of police to address particular community problems as they arise. It would instead, as cases are brought over time, encourage police to divide criminal offenses into two categories: those for which they should always arrest and those for which they should never arrest. After all, to the extent that a law is enforced at every possible opportunity through an arrest, then officers would have a strong, if not air-tight, defense to a retaliatory-arrest claim. Conversely, police would be inclined to forgo an arrest if the criminal law that has been violated will not, or cannot, be regularly enforced at all other times and locations. Fearing a retaliatory-arrest claim, officers would be especially hesitant to make legitimate arrests for many types of offenses that might not be considered

"commonly enforced" or clearly "serious." This would be a natural if unintended consequence of petitioner's rule.

Among other problems, this inflexible, "all or nothing" approach is antithetical to the concept of community-oriented policing and other proactive policing strategies. Petitioner's rule reinforces an outdated view of policework: one that is basically reactive, waiting for a crime to be reported or observed and then responding in some automatic fashion based on the seriousness of the offense under the criminal code. *See* Alafair Burke, *Policing, Protestors, and Discretion*, 40 Fordham Urb. L.J. 999, 1009-10 (2013).

By contrast, community-oriented policing emphasizes that "[l]aw enforcement agencies should work with community residents to identify problems and collaborate on implementing solutions that produce meaningful results for the community." *Final Report of the President's Task Force on 21st Century Policing* 45 (2015), https://ric-zai-inc.com/Publications/cops-p311-pub.pdf. Community policing calls for decentralized decision-making, involving "increasing tolerance for risk taking in problem-solving efforts, and allowing officers discretion in handling calls." Office of Community Oriented Policing Servs., U.S. Dep't of Justice, *Community Policing Defined* 5-6 (2014), https://tinyurl.com/y7gows48. It also envisions continually identifying and prioritizing problems, designing responses, and evaluating their effectiveness. *Id.* at 10-12.

The mistaken premise of petitioner's approach is that certain offenses are too minor, or result too infrequently in arrest, such that any arrest for those offenses would be inherently suspect. Far from it. Sometimes heightened enforcement of certain "minor" criminal laws can be quite important to a community.

"[T]he narrow focus of the past on the seeming triviality of incidents of minor disorder ignores the communal harms that can be visited upon a neighborhood when these incidents multiply into a neighborhood problem." Debra Livingston, *Police Discretion and the Quality of Life in Public Places*, 97 Colum. L. Rev. 551, 591 (1997). "[I]n community policing, police often exercise their discretion by addressing low-level crimes that might not warrant attention in comparison to more serious crimes, but which the community views as detrimental to their quality of life." Burke, *supra* at 1010-11. Potential community concerns are manifold and could include, as just a few examples, late-night noise and disorderly conduct, trespassing, graffiti, illegal dumping, or package theft.

At the same time, a community-oriented approach encourages police "to think innovatively" and "view making arrests as only one of a wide array of potential responses." *Community Policing Defined*, *supra* at 10. By seeking the community's input as to both problems and responses, "community policing tends to be extremely localized." Burke, *supra* at 1011. Petitioner's demand that arresting officers show that police generally arrest for the offense ignores the dynamic nature of community policing and undercuts its application.

II. States And Localities Have Effective Mechanisms For Ensuring That Officers Do Not Make Retaliatory Arrests, And Therefore A Damages Remedy Is Unnecessary.

Petitioner's rule is especially unwarranted given the comprehensive procedures that state and local jurisdictions have developed to address police misconduct and control the power of arrest. Those safeguards can ably protect against retaliatory arrests without eliminating the objective, probable-cause standard for

an arrest's constitutionality and opening the floodgates to damages lawsuits. State and local governments are better situated to fashion flexible remedies that balance effective law enforcement with proper restraints on police officers and redress for their misdeeds.

A. Administrative review of police conduct provides an effective alternative for investigating and addressing allegations of retaliation.

State and local jurisdictions are capable of handling citizen complaints against officers for improper conduct, including retaliatory arrests. Of course, judicial safeguards will always remain, such as when arrest is without probable cause or where criminal laws lack "minimal guidelines to govern law enforcement." *Chicago v. Morales*, 527 U.S. 41, 60 (1999). But regardless of the potential for civil liability, officers who arrest or take other actions for improper reasons are subject to disciplinary action. Both internal and external administrative processes exist throughout the nation to provide an efficient and effective response to complaints against officers who violate the law or local policies. This provides a valuable check against retaliatory arrests.

Law enforcement agencies, including through internal affairs units in larger agencies, receive and resolve citizen complaints as an important part of their law enforcement functions. There is widespread recognition among law enforcement that holding officers accountable for their actions is essential to maintain the public legitimacy that police need to be effective. Int'l Ass'n of Chiefs of Police, *Building Trust Between the Police and the Citizens They Serve* 5-7, https://ric-zai-inc.com/Publications/cops-p170-pub.pdf. Indeed, such public accountability is another component of

community-oriented policing. *Id.* Citizen complaints also assist a police department in supervising and managing its officers. Those complaints not only help identify officers who should be monitored more closely, disciplined, or removed for misconduct, but also reveal areas where better training or enhanced supervision is needed. In short, police departments have an interest as well as a duty in appropriately investigating citizen complaints.

Citizen review boards, or other types of external review, are another mechanism to address citizen complaints. "[C]ivilian oversight has been increasingly institutionalized as a regular feature of policing in cities and counties across the U.S." Joseph De Angelis, et al., *Civilian Oversight of Law Enforcement: Assessing the Evidence* 49 (2016), https://tinyurl.com/y94aelhc (identifying "more than 140 civilian oversight agencies, with almost all large cities having some sort of civilian oversight"). There is a wide range of civilian oversight—from "limited authority to reviewing and making recommendations to boards that have investigative and subpoena powers"—and each community may consider its own form of civilian oversight that meets its needs. *The President's Task Force on 21st Century Policing Implementation Guide* 7 (2015), https://ric-zai-inc.com/Publications/cops-p341-pub.pdf. Among its features, civilian oversight can provide independent review of citizen complaints.

In the District of Columbia, for example, a citizen may file a complaint with the independent Office of Police Complaints, which is overseen by a publicly appointed board. D.C. Code §§ 5-1104, 5-1105. The Office of Police Complaints investigates complaints of harassment (among other types of complaints), which broadly includes arrests in violation of the law or

internal police guidelines. D.C. Mun. Regs. tit. 6A, §§ 2104.1, 2199.1. It has the power to subpoena witnesses and documents. D.C. Code § 5-1111(c). The Office of Police Complaints even has direct and immediate access to the videos from body-worn cameras that all D.C. Metropolitan Police Department patrol officers now use. D.C. Office of Police Complaints, *Annual Report 2017*, at 18-19, https://tinyurl.com/ycvouesc. If the Office sustains a complaint, it refers the matter to the Metropolitan Police Department to recommend, and the police chief to decide, the imposition of discipline. D.C. Code § 5-1112. Generally, the police chief may not reject the merits determination of the Office of Police Complaints. D.C. Code § 5-1112(e), (g).

Other cities have similar review boards that investigate citizen complaints against police officers. In New York City, an independent Civilian Complaint Review Board with subpoena power investigates several types of complaints—including complaints of abuse of authority—and makes merits findings. N.Y.C., N.Y., Rules tit. 38A, §§ 1-02(a), 1-23(d). If it substantiates the allegations, the Board recommends a type of discipline and, in the most serious cases, can prosecute disciplinary charges against the officer at an administrative trial. *See* N.Y.C. Civilian Complaint Rev. Bd., *Police Discipline*, https://www1.nyc.gov/site/ccrb/prosecution/police-discipline.page. If the police commissioner intends to impose discipline at a level below that recommended by the board or administrative tribunal, the commissioner must provide a detailed explanation of the reasons and allow the board an

opportunity to respond. N.Y.C., N.Y., Rules tit. 38A, § 1-46(f).[1]

External review can take other forms, such as review of a department's internal affairs investigations. For example, the Los Angeles Police Department has an independent inspector general, who is selected by a civilian Board of Police Commissioners. L.A., Cal., Charter vol. I, § 571(b)(4). The inspector general's office oversees the police department's handling of complaints of misconduct by police officers. L.A., Cal., Charter vol. I, § 573. It receives copies of every complaint filed, audits selected investigations, and conducts systemic reviews of the disciplinary system. *See* L.A. Police Dep't, *Office of the Inspector General*, http://www.lapdonline.org/police_commission/content_basic_view/1076. It also has subpoena power to conduct its own investigations. L.A. Bd. of Police Comm'rs, *Policies and Authority Relative to the Inspector General* § VII (approved Nov. 21, 2000), https://tinyurl.com/y7dab2vd.

Moreover, through legislation and policymaking, States can provide oversight of local citizen complaint

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[1] These civilian review agencies in the District of Columbia and New York City regularly report on complaint dispositions, including discipline and other remedial actions. *See* D.C. Office of Police Complaints, *Annual Report 2017*, at 32, https://tinyurl.com/ycvouesc; N.Y.C. Civilian Complaint Rev. Bd., *Semi-Annual Report, Jan.-June 2017*, at 25-31, https://tinyurl.com/yc7wjjcz. Of course, disciplinary action is imposed in many other instances directly through the police departments. These civilian review agencies also attempt to resolve complaints through mediation, which is held if both parties agree and can be very effective. *Annual Report 2017*, *supra* at 22-23; *Semi-Annual Report, Jan.-June 2017*, *supra* at 32-36. As the statistics show, civilian complaints produce meaningful outcomes, not empty processes.

processes. For example, California requires each police department to establish and publicize its procedure to investigate civilian complaints, provide the complainant timely, written notification of the complaint's disposition, and publicly report statistics on complaint dispositions. Cal. Penal Code §§ 832.5(a), 832.7(e)(1), 13012(a)(5)(A)(i), (B), (C). *See also* Cal. Dep't of Justice, *Policy Governing Citizen Complaints Against Law Enforcement* (Jan. 2017), https://tinyurl.com/ycqvhuy2 (establishing that the Attorney General will review citizen complaints against local law enforcement agencies for possible investigation after exhaustion of local processes).

Some states have also directed that commissions develop detailed standards that all law enforcement agencies must implement for the investigation of citizen complaints. In Connecticut, as specified by statute, those standards address issues such as the manner of acceptance of complaints, investigation protocols, and the documentation of the receipt of complaints and their dispositions. *See* Conn. Gen. Stat. § 7-294bb; Conn. Police Officer Standards & Training Council, *Mandatory Uniform Policy: Complaints That Allege Misconduct by Law Enforcement Agency Personnel* (May 14, 2015), https://tinyurl.com/y93qdw3y. Other states have similar statutes. *See* Me. Rev. Stat. tit. 25, § 2803-B(1)(G), (2); Md. Code Ann., Pub. Safety § 3-519; N.J. Stat. § 40A:14-181; Vt. Stat. Ann. tit. 20, § 2402 (effective July 1, 2018); *see also* R.I. Gen. Laws § 31-21.2-8.

Regardless of the particular mechanism in each jurisdiction, administrative processes are available to thoroughly investigate complaints of retaliatory arrest and impose appropriate disciplinary action, thus making a damages remedy unwarranted.

B. Additional protections exist through limitations on the arrest power and through policies on arrest alternatives.

To ensure that the power of arrest is used appropriately, States may also limit officers' authority to conduct a warrantless arrest. States generally preclude arrest without a warrant for misdemeanors committed outside of an officer's presence. *See Atwater*, 532 U.S. at 355-60 (listing statutes). This in-presence requirement is a safeguard that petitioner fails to mention but would almost certainly preclude warrantless arrest in all the examples he cites using Florida law. Pet. Br. 23; Fla. Stat. § 901.15 (authorizing arrests for misdemeanors committed "in the presence of the officer" if arrest is "made immediately or in fresh pursuit," excepting offenses such as domestic violence and child abuse).[2]

Many States have also chosen "more restrictive safeguards through statutes limiting warrantless arrest for minor offenses." *Atwater*, 532 U.S. at 352. Such safeguards include provision for release on a citation or summons, with a promise to appear later to answer the charge, in lieu of a full custodial arrest. By statute or court rule, almost all States provide for citation release for some misdemeanors (and occasionally even felonies). Nat'l Conference of State Legislatures, *Citation in Lieu of Arrest* (updated Oct. 23, 2017), https://tinyurl.com/yd9wsf9d (providing summary chart of state laws).

Twenty-four states create at least "a presumption to issue citations for certain crimes or under certain

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[2] Although petitioner suggests that stealing some computer paper would be a *felony* computer crime, this seems quite implausible, *see* Fla. Stat. § 815.02(3), and would surely be just misdemeanor theft under Fla. Stat. § 812.014(3)(a).

circumstances." *Id.* For example, this Court's decision in *Moore* arose because of a Virginia statute that generally directs officers to issue citations for most misdemeanor traffic offenses. 553 U.S. at 167; *see* Va. Code § 46.2-936. Another Virginia statute generally requires citations for most misdemeanors that are not punishable by a jail sentence. Va. Code § 19.2-74. These and other similar state statutes typically have exceptions permitting a custodial arrest, such as where there are reasonable grounds to believe that the person will not appear to answer the citation, will continue the offense, or poses a danger to persons or property. *Citation in Lieu of Arrest, supra.*

Where state law might not create a presumption or otherwise establish guidelines for citation release, localities may set their own policies. For example, New York City officials announced that police will issue summonses and "no longer arrest individuals who commit [low-level] offenses—such as littering, public consumption of alcohol, or taking up two seats on the subway—unless there is a demonstrated public safety reason to do so." Press Release, *District Attorney Vance, Commissioner Bratton, Mayor De Blasio Announce New Structural Changes to Criminal Summonses Issued in Manhattan* (Mar. 1, 2016), http://manhattanda.org/ node/5847/print. Other local governments have taken similar measures. *See, e.g.*, Edward Sheehy, et al., *Greenville Police to Issue Citations for Small Crimes Instead of Arrests*, WITN.com News (Oct. 9, 2017), https://tinyurl.com/y9ow3ll9. While discretionary determinations about public safety will still likely be involved in the decision whether to issue a citation in lieu of arrest, guidelines and policies can ensure that those determinations are based only on proper considerations.

As this Court has recognized, "it is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason." *Atwater*, 532 U.S. at 352. States too recognize those costs and have fashioned laws and policies to achieve an appropriate balance of interests. *Citation in Lieu of Arrest, supra*. The arrest limitations adopted by states and localities further reduce any potential for retaliatory arrests.

CONCLUSION

This Court should affirm the decision of the court of appeals.

Respectfully submitted,

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